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TESTIMONY OF THE HONOURABLE IRWIN COTLER,

MINISTER OF JUSTICE

AND ATTORNEY GENERAL OF CANADA

TO THE

STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY, AND ETHICS

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Introduction

I am pleased to have this opportunity to share with you a comprehensive framework for access reform – and a corresponding strategy involving a central role for parliament – to achieve this reform.

Indeed, access reform is something that the Government of Canada is committed to – and that has been a longstanding concern of mine – and which proceeds from two basic principles:

First, that freedom of information is a cornerstone of a culture of democratic governance, involving accessibility, transparency and accountability in government; and

Second, that the Access to Information Act is itself a pillar of democracy, whose importance is such that it has been recognized as a quasi-constitutional statute by the Federal Court of Canada, relying on the words of the Supreme Court of Canada in Dagg v. Canada (Minister of Finance), 1997 2 SCR 403. The Supreme Court wrote, that the Act "helps to ensure that citizens have the information required to participate meaningfully in the democratic process, and that politicians and bureaucrats remain responsible to the citizenry."

Accordingly, the Government of Canada is committed to reforming the Access to Information Act so that it meets the needs of Canadians and further strengthens the integrity, accountability, and transparency of government operations.

Canada 's proactive approach to ATI reform

Canadians are fortunate to have benefited from a law that has provided a comprehensive right of access to government information since the Act was introduced in 1983. Canada was one of the first countries to have enacted access legislation and seeks to be among the world's leaders in governing in a transparent manner. You may recall that when the legislation was first enacted, Canada was viewed as a model country in this area, and indeed the legislation has served us well.

However, it is in need of reform. Twenty-two years later, it is no longer up-to-date, and needs to be modernized, while deficiencies have been revealed that need to be addressed.

This is not to say that we have done nothing over the past twenty years; the government – in cooperation with parliamentarians - has taken several steps to ensure the Act keeps pace with society. For example:

In 1999, a provision was added to the Act that makes it a criminal offence to alter, destroy, or conceal a record in order to thwart an access request.

In 2000, the President of the Treasury Board announced the establishment of the interdepartmental Access to Information Review Task Force, which was asked to review and make recommendations on all components of our Access to Information framework. The Report of the Task Force, published in June 2002, set out 139 recommendations relating to legislative and administrative reforms to improve the federal access regime.

When the new government was sworn in on December 12 th 2003 , the Prime Minister stated that increased transparency would be one of the new government's guiding principles. The Prime Minister also announced a new policy on the mandatory publication of travel and hospitality expenses for selected government officials.

In 2004, The President of the Treasury Board launched t he Review of the Governance Framework for Canada 's Crown Corporations as one of a series of initiatives to strengthen transparency, accountability, and management across the federal public sector.

Tabled in February 2005, the Review identifies more than thirty measures to strengthen oversight, management and accountability and to increase transparency in Crown corporations.

The need for a comprehensive framework – and related strategy - to reform the ATI Act

While there have been a few amendments to the Act over the years, none of them constitute the comprehensive reform required to adequately respond to the current environment. In fact, it has been more than fifteen years since Parliament even reviewed the Act in depth, let alone proposed amendments.

Yet much has happened in the administration of government – in the expectation of a culture of democratic governance – both in Canada and internationally, since the Act was passed.

Simply put, citizens expect greater involvement in the decision-making process of their governments – what has been called "participation rights" - while rapid advances in information technology have changed the way government creates, stores, manages, and communicates information.

Issues related to ATI reform are complex and competing expressions of the public interest

In recent years, some Members of Parliament have introduced Private Members Bills aimed at extensively reforming the ATI Act, while the Task Force report underpinned reformist considerations.

The Government of Canada agrees that the Act must be reformed, and agrees in principle with many of the proposals made in these Private Members Bills and recommendations in the Task Force report – indeed, this comprehensive framework is itself guided and inspired by these initiatives.

But it needs to be appreciated that some of these issues are complex, and involve significant and competing conceptions of the public interest. They engage diverse interests of government, NGOs, and various stakeholders. What is required is the informed, comprehensive and considered appreciation of the competing and serious expressions of the public interest. We also need to consider the related additional costs associated with administering the access regime.

Therefore, reform of an Act that is in constant and continuous use – and with a multi-layered complexity – requires the application of the precautionary principle to ensure that proposed reforms actually provide appropriate and workable improvements to the overall scheme. As well, we cannot act unilaterally on reforms without facing the significant risk of adversely affecting the range of interests - and stakeholders - in a prejudicial manner.

May I provide you with some concrete examples of these complexities and corresponding competing interests.

1. My colleague Minister Alcock has stated that the Government will cover more Crown corporations under the ATI Act, and as I mentioned, he followed this up with the Review that was recently tabled. I entirely agree with this approach. However, despite their connection to the Government, there can be no doubt that these Crowns are corporations that compete in the open market in a variety of fields. For example, Export Development Corporation works to expand export markets for the products of Canadian companies. In order to do this, EDC must have access to confidential information about the businesses it works with. Those businesses have told EDC that they will not share their confidential information with EDC if that information is subject to access laws. This is because they fear that their competitors will submit an access request to EDC for their confidential information.

If we care about the competitiveness of Canadian businesses and the potential survival of our Crowns, then we must give serious thought to how we would bring them under this legislation without jeopardizing their very raison d'être. Additional protections for the interests of Crowns and their business partners may have to be added to the Act. If so, these new protections would have to be crafted with great care in order to balance openness with the crucial need to protect confidential business information.

2. As another example, there is the issue of covering agents of Parliament, such as the Chief Electoral Officer, the Information and Privacy Commissioners, and the Auditor General. These agents receive large amounts of confidential information from other entities. The importance here is maintaining a distinction between the administration of these Offices, and the confidential data they collect.

3. Let me start by mentioning two items where current protections in the Access to Information Act have been the subject of much criticism and dramatic reform proposals: Ministers' offices and Cabinet confidences. These exclusions were designed to protect key political functions of the Executive, long recognized as essential components of our Westminster style of parliamentary democracy. Let me emphasize, in relation to Cabinet Confidences the Government believes the status quo is not an option and is committed to substantial reform, both to the Access to Information Act and the Canada Evidence Act.

With respect to Ministers' Offices it is important to bear in mind that any change to these historic protections needs to take into consideration the fact that ministers are also Members of Parliament and members of political parties, operating in a partisan parliamentary environment. In recent months this Government has made a number of administrative changes to enhance transparency (for example, with respect to ministerial expenses) and recent court decisions have clarified and improved the treatment of Cabinet confidences. As parliamentarians who understand the importance of the political process and appreciate the complex balance of our particular parliamentary democracy, you will no doubt have views on these important and complex issues. You may well want to consider the impact of such changes on the functions of Members of Parliament more generally, and specifically whether the Access regime should apply to all MP's as

well.

4. A fourth example is the modernization of certain exemptions. For example, the exemption in section 24 provides a link between the Act and confidentiality clauses in other federal statutes. Entities subject to the Act are required to protect information covered by these confidentiality clauses. As far back as the original Parliamentary review of the Act in 1986, concern was expressed about too many confidentiality clauses being linked to section 24. This concern is entirely valid as the number of clauses listed has gone from forty to over seventy. Private members bills have proposed the complete repeal of section 24. This is too blunt an approach; there are some confidentiality clauses that really should be listed. Not seventy, but some—for example, the confidentiality clauses in the Income Tax Act and in the Statistics Act.

Now if I may, let me mention a subject very close to me in my role supporting the Anti-terrorism Act review. The security environment has changed dramatically since the Access to Information Act came into force, especially since the events of September 11, 2001. Internationally, through UN Security Council resolutions and domestically, with our own anti-terrorism law, states have strengthened their capacity to protect the security of citizens against acts of terrorism. It is significant to note that these heightened security concerns have not in any way necessitated a closing down of our access to information regime. As Alasdair Roberts has written (in his article, "National Security and Open Government" in the Georgetown Public Policy Review), openness in fact can help strengthen security by shedding light on important issues of public concern. The old saying is that "loose lips can sink ships", but tight lips can also sink ships. Indeed, neither the Task Force nor our more recent review of the access regime found that greater protections were required for national security information. This makes ample good sense to me as I have always emphasized that security measures in a democracy must be fundamentally about protecting core human rights such as the right to human security and our core democratic values, and access to information law is an important pillar of our democratic system.

Having said this, in crafting our anti-terrorism legislation the government and parliamentarians took great pains to develop appropriate ways to protect national security information while making it available as needed in court proceedings. The new provisions of the Canada Evidence Act give me a very serious role in promoting the proper balance between protection of national security information and openness in legal proceedings. My sense is that parliamentarians who helped craft the Access to Information Act succeeded in setting a balance between protecting security and openness that continues to serve us well to this day.

Why a discussion paper is the best strategy

We all share a common goal: to have the most comprehensive and workable access legislation possible. We must therefore craft a set of reform proposals that effectively balances the complex and varied interests at stake.

I believe in a greater role for parliamentary committees in the reform of legislation that is of such crucial importance. Accordingly, in my view, it is imperative that this Committee have an opportunity to study the issues brought forward by the Task Force report and by Information Commissioners present and past—particularly the complex ones I've touched on—and provide input on access reform before amendments are tabled in the House of Commons.

Therefore, I have decided that the most appropriate action is to present this Committee with a paper outlining areas of potential access reform that would benefit from further discussion and study. This paper is a critical step to ensuring an effective and comprehensive set of amendments. I view this as the beginning of a necessary dialogue between this committee and myself and Mr. Alcock on the exact shape of these reforms.

The ATIA is by nature all about a complex balancing of openness, transparency, accessibility to Canadians, and accountability. You may recall the criticism by the Information Commissioner at

the time of the Task Force Report that parliamentarians had not been consulted in that government review exercise. That is why I am before you today: to consult with parliamentarians; to ensure that both our process and our product on access reform are supportive of democratic engagement, by opening a dialogue with this Committee on a subject that is complex in scope and substance, and of particular importance to parliamentarians.

As Minister of Justice, I am anxious to move forward on this file. But as a Member of Parliament, I want to ensure that Parliament's voice is heard before we proceed. By actively engaging Parliamentarians on the issue of access reform, the Government affirms its commitment to transparency, accountability, integrity, and its broader agenda on democratic reform.

This necessitates a thorough, open and inclusive process, with abundant, early, and frequent opportunity to discuss what reforms to the Act will look like. Government would rather err on the side of being open and inclusive than rush to a fast result and simple solutions to complex problems, without having adequate consultation and deliberation.

Canadians need to be fully engaged in reform of an Act that is about their rights, and the honourable members of this Committee play an important role in ensuring this broad public engagement.

Role of the Committee

Specifically, it is my hope that you will see fit to consider doing the following.

1. I invite the Committee to examine the specific concerns that I have outlined in this discussion paper, for example those issues regarding Cabinet confidences, Crown corporations, agents of Parliament, and modernizing current and creating new exemptions.

2. It would also be helpful if the Committee would advise us regarding how best to protect the interests of the various entities, if they are to be covered under the Act, such as Crowns and their subsidiaries, and alternate service delivery organizations. In this regard, we need to be mindful of the burden that being subject to the Act undoubtedly places on an entity, particularly for organizations whose competitors do not face this added and potentially time-consuming and costly responsibility.

3. We would benefit from the Committee's views on how to subject agents of Parliament to the ATIA while addressing their concerns not to impair their core mandate whereby they must handle large amounts of information belonging to others.

4. On the issue of exemptions, it would be greatly helpful if the Committee would review the list of over seventy confidentiality clauses linked to section 24, and retain only the necessary ones.

5. As I mentioned earlier, the discussion paper considers reform of Cabinet confidence protections and suggests a number of important improvements. It also discusses the applicability of the Act to records under the control of a Minister's office. It has always been the position of the Government that the ATIA does not apply to records under the control of Ministers' offices, an interpretation that was endorsed by the first Information Commissioner. The Government interprets the ATIA as recognizing a distinction between records under control of a Minister's office and records under the control of a government institution. This distinction allows for the free and frank debates that are required to ensure the proper functioning of the political process. Our system of democracy depends on electoral, parliamentary, and decision-making processes in which political parties and political considerations play vital roles. These processes require confidentiality in order to function effectively. While the Government has a position on this issue, we expect Committee members to have views on this and are open to discussing the issue further.

6. I believe it would also be useful to the Committee to hear first-hand the perspectives and

concerns of the various stakeholders, including regular users of the Act such as the media and public interest researchers. It will be particularly important to canvas the various issues with the Information Commissioner whose knowledge and experience will be invaluable to this Committee.

Access as a pillar of democracy

The Access to Information Act sets out fundamental rights for Canadians and contributes to open and transparent government. The courts have described it as quasi-constitutional in nature, helping to ensure that citizens have the information required to participate meaningfully in the democratic process.

However, the right to access government information is not absolute. In certain cases, limitations are necessary and entirely justifiable. It is for this reason that the Act contains exemptions that protect the privacy of individual Canadians, law enforcement activities, and issues of national security and defence, for example.

When we are dealing with a quasi-constitutional statute of fundamental importance to our democracy it is imperative to strike the appropriate balance between openness and protecting sensitive information.

Conclusion

Our goal is to ensure increased transparency and accountability, while balancing access, protection of compelling interests, efficiency and fairness.

This discussion paper has been guided and inspired by the work done by the ATI Review Task Force, by proposals put forward in Private Members' Bills, and by proposals made by the Information Commissioner in the past.

Considering the magnitude and impact of the ATI Act, we must come together as Parliamentarians to discuss access reform, hear from expert witnesses, and consider all elements, all perspectives, and all people. In this way, access reform will be enriched by the expertise of the committee.

Once the Committee has completed its important work, the government will be in a far better position to move forward with ATIA reform.

Thank you.

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